No. 14,608

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN LEE,

Appellant,

vs.

EDWIN B. SWOPE, Warden, or his Successor, United States Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,
United States Attorney.
RICHARD H. FOSTER,
Assistant United States Attorney,
422 Post Office Building,
Seventh and Mission Streets,
San Francisco 1, California,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

INDEX

Table of Authorities Cited

Cases

Statutes

No. 14,608

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN LEE,

Appellant,

vs.

EDWIN B. SWOPE, Warden, or his Successor, United States Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Section 2255 of Title 28 United States Code. Since appellant is a military prisoner, sentenced by a military court martial, it would appear that Section 2255 does not apply to this proceeding. This action was for a writ of habeas corpus and apparently was pursuant to Sections 2241, 2242 and 2243 of Title 28 United States Code. Appeal in a habeas corpus proceeding is provided by Section 2253 of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellant filed a petition for a writ of habeas corpus on October 18, 1954 (Tr. 3-7). United States District Judge Oliver J. Carter issued an order to show cause that same day (Tr. 8). E. B. Swope, Warden of the United States Penitentiary at Alcatraz, California, filed a return to the order to show cause on October 20, 1954 (Tr. 9-23). A memorandum of points and authorities was filed by appellant on October 21, 1954 (Tr. 25-34). Judge Carter filed a memorandum and order dismissing the petition for a writ of habeas corpus and discharged the order to show cause on October 22, 1954 (Tr. 34-36). Appeal was timely made to this Court from that order (Tr. 36).

FACTS.

Appellant is confined by virtue of the judgment and sentence of a General Court Martial approved on March 28, 1947 (Tr. 10, 35). This sentence is for a term of 20 years and was adjudged for the crime of robbery (Tr. 16-20). Appellant is eligible for release on this sentence October 24, 1960 (Tr. 23). The validity of this sentence is not challenged (Tr. 35). The sentence which appellant attacks will commence on October 24, 1960 (Tr. 23). This sentence is one for murder, and it is for a life term (Tr. 23). Appellant was given a dishonorable discharge from the United States Army on June 12, 1947 (Tr. 10). The judgment of conviction which appellant attacks was im-

posed on September 13, 1949 (Tr. 10) for a crime committed while he was a prisoner at the Branch United States Disciplinary Barracks, Camp Cooke, California (Tr. 4, 21). Appellant alleges that at the time of the murder for which he was convicted he was a "civilian" in Army control, and the court martial which tried him was without legal jurisdiction (Tr. 5). Appellant has appealed his conviction and sentence to the Judge Advocate General and Secretary of the Army (Tr. 4).

QUESTIONS PRESENTED.

1. In a habeas corpus proceeding may the validity of a sentence be questioned before the sentence commences?

2. Is there court martial jurisdiction after discharge over prisoners serving a sentence by virtue of a court martial?

ARGUMENT.

I. THE PETITION FOR A WRIT OF HABEAS CORPUS IS PREMATURE.

Appellant is presently serving a sentence, the validity of which he does not challenge (Tr. 35). This sentence will expire on October 24, 1960 (Tr. 23). The murder sentence which appellant questions will not commence to run until that date (Tr. 23).

Appellant argues that the Court should have passed on the merits of his petition despite the fact that a favorable ruling on the sentence which he was attacking could not result in his immediate release (Appellant's Brief, page 6). In support of this position appellant cites several state cases and two District Court opinions which commented on the merits of petitioners' cases despite the fact that the petitions were premature. Appellant urges that postponing an adjudication on the merits of his second sentence would, in the event that this sentence were reversed, deny him due process, the right to a speedy trial, and the right to confront witnesses (Appellant's Brief, page 8).

In our opinion, appellant has misconceived the nature of a writ of habeas corpus. Habeas corpus is not a substitute for appeal. Its only function is to determine legality of present detention. The only judicial relief authorized is the discharge of the prisoner. *McNally v. Hill,* 293 U.S. 131, 136. In the case last cited the Supreme Court declared that diligent search of the English cases before the adoption of the Constitution "has failed to disclose any case where the writ was sought or used, either before or after conviction, as a means of securing the judicial decision of any question which, even if determined in the prisoner's favor, could not have resulted in his immediate release." *McNally v. Hill,* supra, page 138. The Court held that the use of habeas corpus where the petitioner is confined under an admittedly

valid sentence is unauthorized by the statutes of the United States (at page 140).

This Court has many times been asked to inquire into the validity of a sentence where a favorable decision would not result in the petitioner's immediate release. Without exception this Court has held that the petition was premature and that habeas corpus could not be so used. *See ex parte Melendez* (9th Cir.), 98 F.2d 791; *McNealy v. Johnston* (9th Cir.), 100 F.2d 280; *McDonald v. Johnston* (9th Cir.), 149 F.2d 768; *Dunlap v. Swope* (9th Cir.), 103 F.2d 19; *Graham v. Squier* (9th Cir.), 145 F.2d 348; *Demaurez v. Squier* (9th Cir.), 121 F. 2d 960; *Oddo v. Swope* (9th Cir.), 193 F.2d 492; *Woolomes v. Heinze* (9th Cir.), 198 F.2d 577.

Appellant argues that a failure to inquire into the merits of his second conviction will deny him the right to a speedy trial. This is a somewhat unusual interpretation of the constitutional requirement. Appellant was convicted. He had a trial. He now seeks to set that trial aside. It has never been held, to our knowledge, that where judgment has been set aside, the defendant's rights have been violated by a new trial. Appellant argues that he will be deprived of the right to confront witnesses apparently because of the length of time which has elapsed from the murder conviction. The government, however, rather than appellant, is likely to be handicapped by this time lapse. If by some chance appellant's conviction were to be reversed after all these years, the Army

would be faced with an almost impossible task in finding and locating the witnesses necessary to prove its charges. The probabilities are that some witnesses have died and that the majority no longer recall the evidence with any clarity at all.

Appellant has not shown how his case, even assuming all he says to be true, would differ from any other case where the petitioner was serving a lengthy valid sentence. No reason is given for this Court to overrule its prior decisions.

II. THERE WAS JURISDICTION TO COURT MARTIAL APPELLANT.

Appellant argues that since he had received a dishonorable discharge prior to the time the murder took place there was no court martial jurisdiction. The facts were that appellant was given a dishonorable discharge on June 12, 1947 (Tr. 10). The murder occurred while he was a prisoner at the Branch United States Disciplinary Barracks, Camp Cooke, California, on June 10, 1949. He was still an Army prisoner on the date of his murder court martial (Tr. 10). Section 1473 of Title 10 (Article of War 2) provides in part as follows:

> "The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' or 'persons subject to military law,' whenever used in these articles: . . . All persons under sentence adjudged by courts-martial;"

At the time the evidence which led to appellant's court martial took place, he was under sentence of robbery adjudged by a court martial approved on March 28, 1947 (Tr. 10, 35).

It has been settled since 1895 that persons who commit offenses while serving a sentence adjudged by a court martial are subject to court martial in spite of the fact that they have been dishonorably discharged from military service. In that year the case of *In re Craig,* 70 Fed. 969, was decided. In that case the petitioner was dishonorably discharged and confined at Leavenworth Military Prison for the offense of desertion. While there he assaulted the Commandant and was tried by court martial. The Court examined Article of War 2 and declared that this statute was not unconstitutional, and held that there was jurisdiction to try discharged prisoners serving military sentences.

The Supreme Court decided the question in 1920 in the case of *Kahn v. Anderson,* 255 U.S. 1. This case is indistinguishable from the instant one. In the *Kahn* case the petitioners were convicted of conspiracy to murder a fellow prisoner. The alleged offense occurred while they were confined at the United States Disciplinary Barracks at Leavenworth. The petitioners contended that by the sentence under which they were confined at the time of the alleged murder they had ceased to be soldiers and were no longer subject to military law. The Court held:

> "But, as the allegations of the petition and the contention based upon them concede that the peti-

> tioners were, at the time of the trial and sentence complained of, military prisoners undergoing punishment for previous sentences, we are of opinion that, even if their discharge as soldiers had resulted from the previous sentences which they were serving, it would be here immaterial, since, as they remained military prisoners, they were for that reason subject to military law and trial by court-martial for offenses committed during such imprisonment."
>
> *Kahn v. Anderson,* supra, page 7.

In *Carter v. McClaughry,* 183 U.S. 365, 383, it was said in reference to the petitioner in that case:

> "He was a military prisoner though he has ceased to be a soldier; and for offences committed during his confinement he was liable to trial and punishment by court martial under the rules and articles of war."

Other cases which have held that prisoners under sentence of a court martial are subject to military law are *Mosher v. Hunter,* 143 F.2d 745; *Mosher v. Hudspeth,* 123 F.2d 401, cert. den., and *Steele v. Humphrey,* 80 F. Supp. 544.

The one case cited by appellant in support of the contention that as a civilian he could not be subject to military law is a District Court case. *Flannery v. Commanding General,* 69 F. Supp. 661. This case did not involve a court martial prisoner. The Court expressly declared that the interpretation of Section 1473 (Article of War 2) was not involved.

The substance of appellant's argument is that a civilian may not be tried by court martial. This is not the law. Article of War 2 provides that retainers to the camp and persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States are subject to military law. In time of war those civilians accompanying or serving with the Army of the United States in the field may be court martialed. For representative cases dealing with these classes of civilians see *Perlstein v. United States,* 151 F.2d 167 and *Mobley v. Handy,* 176 F.2d 491.

CONCLUSION.

Appellant's claim that a military prisoner may not be tried by court martial is without merit and, furthermore, appellant may not raise this question until 1960. The judgment below should be affirmed.

Dated, San Francisco, California,
March 28, 1955.

LLOYD H. BURKE,
United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
Attorneys for Appellee.